Bradford Coca-Cola Bottling Company *and* Chauffeurs, Warehousemen and Helpers, Local Union No. 110, a/w International Brotherhood of Teamsters, AFL–CIO.[1] Cases 6–CA–22428 and 6–CA–22644

May 22, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On May 3, 1991, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish, during contract negotiations, information requested by the Union regarding the number of cases of beverages delivered by each unit driver during the prior year. As this information was relevant for meaningful evaluation of the Respondent's proposal that the drivers' compensation be converted from an hourly wage to a commission-on-sales basis, we further agree with the judge that the Respondent's refusal to provide this information while at the same time insisting on the commission system demonstrated an intent to frustrate agreement and, therefore, constituted an overall failure to bargain in good faith in violation of Section 8(a)(5).

We reject the Respondent's contention that the judge's analysis on this issue is inconsistent with the Board's decision in *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). That case reiterates that the essential determination to be made concerning a party's alleged failure to bargain in good faith is whether the party's overall conduct indicates that it was endeavoring to frustrate the possibility of reaching agreement. The judge here acknowledged that the Respondent's bargaining on other issues did not, of itself, reflect a desire to frustrate agreement. Noting, however, that the Respondent's proposed commission system would determine the drivers' core terms of employment—their wages and hours—the judge properly found that the Respondent's technique of bargaining on this matter demonstrated that the Respondent took an overall approach designed to defeat the Union's attempt to achieve a collective-bargaining agreement. In this regard, we note the judge's findings that the ''Respondent's tactic of demanding a conversion to a commission-on-sales basis . . . while withholding information which would allow the Union to place that demand in perspective, necessarily permeated, and stultified, the entire bargaining process'' and ''made it impossible for the Union to respond on any basis to Respondent's proposals.''

We additionally agree with the judge that, in light of the Respondent's unlawful failure to provide information and failure to bargain in good faith, the asserted impasse reached before the Respondent's unilateral implementation of its contract proposal was not a good-faith impasse. We also agree that the Respondent could not rely on the employees' coercively induced ratification of the proposal. The ratification vote was cast under the Respondent's threat to implement a less generous proposal in the absence of agreement—an action that the Respondent could not lawfully have taken in the absence of a valid impasse. Accordingly, in these circumstances, we agree that the Respondent's implementation of its contract proposal further violated Section 8(a)(5) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bradford Coca-Cola Bottling Company, Bradford, Pennsylvania, its officers,

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II,a, of his decision, the judge gave an incorrect date in the heading preceding his discussion of the eighth bargaining session. We correct the heading to read: ''Eighth Bargaining Session; January 22, 1990.''

[3] We agree with the judge that Plant Manager Farrell's questioning of employee and Shop Steward Randolph about his cooperation with Board processes violated Sec. 8(a)(1) of the Act. According to Randolph's uncontroverted testimony, which the judge credited, a few days after Randolph had given an affidavit to a Board agent, Farrell questioned Randolph alone in the Respondent's sales room. Farrell asked if Randolph had talked to the Board and Randolph replied that he had. Farrell then asked what Randolph had said. Randolph answered, but did not give any details. Under these circumstances, we find that Farrell's questioning of Randolph violated Sec. 8(a)(1). See *Astro Printing Services*, 300 NLRB 1028 fn. 6 (1990); *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). Chairman Stephens finds it unnecessary to rely on *Johnnie's Poultry* and its progeny, but he agrees that the plant manager's interrogation of Randolph about the information he supplied to the Board in the unfair labor practice proceeding had a reasonable tendency to coerce Randolph within the meaning of Sec. 8(a)(1) of the Act.

agents, successors, and assigns, shall take the action set forth in the Order.

Julie Rose Stern, Esq., for the General Counsel.
William R. Sullivan, Jr., Esq., of Chicago, Illinois, for the Respondent.
Vernon L. Rhodes, of Ebensburg, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case was tried on October 31 and November 1 and 2, 1990, at Bradford, Pennsylvania. On February 2, 1990, Chauffeurs, Warehousemen, and Helpers Local Union No. 110, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) filed the charge in Case 6–CA–22428 against Bradford Coca-Cola Bottling Company (the Respondent). The Union filed the charge against Respondent in Case 6–CA–22644 on April 20, 1990. The order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued on June 1, 1990. Respondent duly filed its answer to the complaint, admitting jurisdiction and the status of certain individuals as supervisors, but denying the commission of any unfair labor practices.

On the entire record[1] and my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation that has an office and plant facilities in Bradford, Pennsylvania, is engaged in the business of bottling and nonretail distribution of carbonated beverages. In 1990, Respondent, in the course and conduct of said business operations, purchased and received at its Bradford facilities products, goods, and materials valued in excess of $50,000 directly from suppliers located at points outside Pennsylvania. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent and the Union engaged in a course of collective- bargaining negotiations that began on July 18, 1989, and ended on January 22, 1990.[2] The complaint alleges that during those negotiations Respondent bargained in bad faith by engaging in ''surface bargaining,'' or conduct designed to frustrate the reaching of agreement on a collective-bargaining contract. This alleged conduct includes bargaining from a fixed position, adopting regressive bargaining positions, and insisting on a contract of 7 years' duration. The complaint further alleges that during the negotiations Respondent refused to furnish relevant information to the Union; to wit: the number of cases of product that had been delivered by Respondent's truckdrivers during the preceding year. The complaint further alleges that on January 29, Respondent unilaterally implemented the terms of the last proposal that it had made to the Union during the negotiations. All of those actions, the complaint alleges, violated Section 8(a)(5) of the Act. Finally, the complaint alleges that Respondent also violated Section 8(a)(1) by threatening employees and making promises to employees in order to get them to ratify its last offer, by encouraging employees to file a Board petition to decertify the Union, by assisting in a decertification effort, and by interrogating an employee about an affidavit that he had given to the NLRB.

As well as denying any conduct that violated the Act, Respondent asserts that the information requested was not relevant to the bargaining process and that its actions of January 29 came after a good-faith impasse had been reached between the parties and after the unit employees had ratified its last offer to the Union.

A. *Facts*

At some time during the 1986–1989 period, the Union became the successor to Teamsters Local 963. Local 963 and Respondent had maintained a collective-bargaining relationship for a number of years, and their last contract was effective by its express terms from May 28, 1986, until May 27, 1989; that contract will be referred to herein as ''the 1986 contract.'' When Respondent entered the 1986 contract, it was a subsidiary of Keystone Coca-Cola Bottling Company (Keystone).

In March the Union submitted to Respondent a set of proposals designed for use in upcoming renewal negotiations. Bargaining for a renewal contract was scheduled to begin in May, but sometime in April Respondent notified the Union that Keystone had been purchased by Herbco, Inc., a Chicago-based corporation owned by one Marvin Herb. Respondent asked that negotiations be delayed. The parties agreed to dely the start of renewal negotiations and further agreed to extend the 1986 contract to November 4.

The 1986 contract contained no unit description; however, under that contract, the Union represented all the truckdrivers, warehousemen, cooler servicemen, and bottle sorters, and it represented the ''night working foreman'' at Respondent's Bradford, Pennsylvania operation. I find that this grouping of employees, which would exclude any professional employees and guards, and supervisors as defined by the Act, constitutes an appropriate unit for bargaining under Section 9(a) of the Act.

At the time of the events in question, there were eight route drivers, two warehousemen, and one or two cooler servicemen, and an undisclosed number of bottle sorters in the bargaining unit. All of these employees were hourly paid under the 1986 contract. Respondent also employed five nonunit ''presalesmen'' who sold the product to retailers. The drivers had no selling function.

The proposals that the Union submitted to Respondent in March called for a 3-year contract with wage increases of 75 cents the first year and 30 cents for each of the next 2 years, a reduction of the workweek from Monday through Saturday

[1] General Counsel's unopposed motion to correct the record is granted. I also correct Tr. 663, L. 6, to change ''That's'' to ''If that's.'' I make other corrections infra.

[2] All dates are between March 1, 1989, and February 29, 1990, unless otherwise indicated.

to Monday through Friday, triple-time for work on holidays (rather than double-time as the 1986 contract provided), and the Union's March proposal called for other increases in benefits. The Union's March proposals, which were the only proposals that the Union submitted throughout the bargaining, also called for rather modest changes in seniority rights and other such matters. Respondent submitted no proposals before the parties met for bargaining table discussions.

Eight bargaining sessions were conducted. At each of the meetings, the chief spokesman for the Union was Vernon Rhodes, business agent. Chief spokesman for Respondent was Hal Burchett, an outside consultant. (In this decision, where I state that ''the Union said'' or ''the Respondent took the position that,'' I am referring to assertions by Rhodes or Burchett, unless otherwise indicated.) As well as Rhodes, the Union's bargaining committee consisted of two stewards, Steve Swackhamer and Greg Randolph. The union committee received assistance, from time to time, from Teamsters officials from the International and from other locals. As well as Burchett, Respondent's bargaining committee consisted of Ralph LeMoyne, director of human resources for Rochester Coca-Cola Bottling Company (another subsidiary of Herbco, Respondent's new parent corporation), Paul Green, vice president of Keystone Coca-Cola Bottling Company, and Joe Mihock, area manager for Keystone. At each session, Respondent's bargaining committee also included the individual who was the Bradford plant manager at the time; this was Mike Rujowski during the first three sessions and David Farrell during the last five. Robert Palo, Herbco's[3] vice president of human resources and industrial relations, attended the third and last meetings. Michael Markowitz, a Teamsters International representative, attended the third, fourth, and last sessions.

On the issue of what happened at each bargaining session, Rhodes was the chief witness for General Counsel; LeMoyne was the chief witness for Respondent. The direct examination of LeMoyne is here used to outline the course of bargaining.

First Bargaining Session; July 18, 1989

Initially, the parties reached several procedural-type agreements on the basis of written proposals tendered by Respondent. These included agreements to ''discuss language first'' and ''discuss economics after language is agreed upon,'' an agreement that ''All agreements are tentative and non-binding until final contract settlement by ratification,'' an agreement that any contract agreed upon would be effective on the day after ratification, and an agreement that the term ''drivers'' would be changed to ''route sales'' throughout the contract. (This last change was proposed by Respondent because it was planning to propose a fundamental change in the method of payments of the drivers—from hourly paid to commission-on-sales. The Union never agreed to change the system of payment; the Respondent does not rely on this preliminary agreement to change the job title to ''route sales'' as any such agreement.)

Four ''language'' proposals by the Union were agreed on at this session: a proposal to change the name of the Union to indicate Local 110 rather than (the dissolved) Local 963 as the collective-bargaining representative, a proposal that each employee be furnished a copy of the retirement plan, a proposal for a broader antiracial and antisex discrimination clauses, and a proposal to state that the term ''he'' was a nonsexist reference meant to include males or females. Other union ''language'' proposals were discussed, but there were no further agreements on the Union's proposals.

Respondent then submitted many proposals, some of which fell into the ''language'' category, but some of which would certainly be considered ''economic.'' The Respondent's proposals were much more dramatic in their potential effect on the employees in the bargaining unit, and the discussions at the first session centered almost entirely on those proposals.

Other than typographical changes, and changes in language that had no practical effect on either party, Respondent made the following proposals; the Union agreed to these proposals only where indicated:

Introduction: Respondent proposed limiting the terms of any contract to Respondent specific street address in Bradford. The 1986 contract was not so limited. The Union agreed. *No-strike and arbitration*: Respondent proposed nostrike and no-lockout clauses that would be effective for the entire term of the agreement. The 1986 contract prohibited strikes only while a grievance was pending the grievance-and-arbitration processes; after an arbitrator issued a decision, either side was free to use economic pressure to enforce the decision. Respondent further proposed that the loser of an arbitration pay the arbitrator's fees and expenses; in the 1986 contract, these costs were divided equally. The Union agreed. *Union Security*: Respondent proposed to change from the 61st day to the 121st day after the contract became effective, or employees were hired, the deadline for employees to join the Union. *Probationary period*: Respondent proposed to increase the probationary period from 60 to 120 days. ''*Wages and other Economic Items*'':[4] There was no proposal on amount of wages. The 1986 contract provided that employees working less than 25 hours per week were not covered by the contract. Respondent proposed that any employee working less than 40 hours a week be considered to be ''part time,'' and that no part-time employees be covered. The 1986 contract permitted Respondent to hire, from May 10 to September 15, an unlimited number of ''summer employees''; they were to be paid any wage above the lawful minimum wage; and they were not covered by the contract. Respondent proposed to increase that period in which it could hire ''summer employees'' from April 1 to October 31, or 7 months out of the year. The 1986 contract required payment of an employee's usual wage when assigned to a lower classification; Respondent proposed to pay the lower rate when the assignment was ''for one day or more.'' *Sick leave*: The 1986 contract provided 1 day of earned sick day for every 2 months worked, with a possible accumulation of 15 days, and it provided for pay for unused sick leave. Respondent proposed to eliminate all sick leave provisions. *Vacations*: The 1986 contract provided that employees were to receive their vacation pay before the vacation started. Respondent proposed to eliminate this provision. The 1986 contract allowed employees to March 15 to choose a vacation period. Respondent proposed, and the Union agreed, to change this to January 31. ''*Holidays and Sundays*'': The

[3] Tr. 408, L. 6, is corrected to change ''Hondo'' to ''Herbco.''

[4] Topic lines that are in quotation marks are the same as topic lines that are used in the 1986 contract.

1986 contract provided eight holidays: New Year's Day, Good Friday, Decoration Day, Independence Day, Labor Day, Thanksgiving Day, ''First Day Deer Season,'' and Christmas Day. Respondent proposed to eliminate Good Friday and the first day of deer hunting season as holidays. The 1986 contract provided for premium pay for work in excess of 32 hours in a week in which a holiday fell. Respondent proposed to eliminate that provision. The 1986 contract provided for double time on Sundays. Respondent proposed to eliminate that provision. Respondent further proposed that only employees who had been employed for a year could receive holiday pay; the 1986 contract had no such restriction. *Seniority*: The 1986 contract provided that, for layoffs and recalls, both seniority and ability would be given consideration and that seniority would be controlling in the case of two employees' being equal in ability. Respondent proposed to eliminate seniority as a consideration in layoff and recall decisions. The 1986 contract provided 5 days for an employee to prove that he could perform a job to which he had been recalled. Respondent proposed to increase that period to 15 days. Respondent further proposed to eliminate seniority as a consideration for filling any job openings, proposing instead to leave such matters to Respondent's sole discretion. *Job stewards*: The 1986 contract provided that stewards could not take strike action ''except as authorized by official action of the Union.'' Respondent proposed elimination of the quoted phrase (as it was simultaneously proposing binding arbitration). Respondent further proposed that the Union could be held liable for ''any unauthorized acts'' by the stewards. Respondent further proposed an article stating that stewards had ''a higher degree of responsibility'' than other employees with regard to, inter alia, ''upholding the rules and regulations of the employer,'' and ''working toward harmony, productivity and service for the customer,'' as well as preventing strikes and slowdowns. *Picket line clause*: The 1986 contract provided that the unit employees could refuse to cross primary picket lines at, or away from, the Respondent's premises. Respondent proposed to eliminate this provision. *Bulletin boards*: The 1986 contract provided that the Respondent would provide a bulletin board and would post notices of union business and social events. Respondent proposed to add language that such notices were to be nonpolitical and noncontroversial, that they should apply only to this bargaining unit, and that they should be approved in advance by management. The Union agreed. *Management rights*: The 1986 contract contained a rather extensive listing of matters that were left to Respondent's final determination, but it had no ''zipper'' clause, or a waiver of all rights that were not covered by the express contract provisions; Respondent proposed addition of such a zipper clause. ''*Loss or Damage to Equipment or Merchandise*'': The 1986 contract provided that an employee could not be held liable for lost or damaged property unless he had been negligent or failed to comply with reasonable rules of conduct or safety. Respondent proposed that employees could be held liable if they had failed to comply with such rules (which were not written anywhere); negligence need not be shown. *Reporting pay*: The 1986 contract provided for 8 hours of reporting pay on holidays and 4 hours of reporting pay on other days. Respondent proposed to limit all reporting pay to 4 hours, and Respondent's proposal barred reporting pay whenever work was not available because of ''an Act of God.'' The Union agreed that Respondent would not be liable for reporting pay if work was prevented by ''an Act of God,'' but it did not agree to eliminate the prior provision for 8 hours of reporting pay on holidays. ''*Additional Wage and Hour Regulations*'': The 1986 contract provided ''Forty (40) hours shall constitute the normal work week, Monday through Saturday.'' Respondent proposed to change ''Saturday'' to ''Sunday,'' and it proposed to add that: ''The work week will be any five (5) days in seven (7) and the payroll period begins 12:01 a.m. Monday [through] 12:00 midnight Sunday.'' *Leaves of absence*: The 1986 contract provided for a maximum of 2 years; Respondent proposed to reduce this to 6 months. ''*Discharges and suspensions*'':[5] The 1986 contract provided that no employee could be discharged or suspended without cause. Respondent proposed to add that ''cause'' was ''cause as determined by the Employer.'' Respondent proposed that it would provide one warning notice to the employee, unless the infraction was certain listed conduct including ''failure to perform assigned work.'' ''*General Conditions*'': This section of the 1986 contract provided that past practices would continue, and it (again) provided that employees could not be held liable for lost, stolen, or damaged merchandise unless it could be shown that the employee hat been negligent, and the same section provided that that job openings for bid would be posted for 2 days. Respondent proposed to delete these provisions. The 1986 contract provided that all vehicles would be equipped as provided by law and that no employee would be required to operate a vehicle that was not in safe operating condition. Respondent proposed to add to this section a provision that: ''The determination of the safety of equipment shall rest with the Employer.'' *Nondiscrimination*: The 1986 contract provided that neither the Respondent nor the Union would discriminate against any employee because of his union activities. Respondent proposed to delete this provision. *Physical examinations (including drug testing)*: Respondent proposed a new article that provided that Respondent could demand that any employee submit, at any time, to physical examinations for which Respondent would pay. If found unfit by Respondent's physician, the employee could be terminated. If the employee's physician has a different opinion, the parties could select a third physician whose opinion will be binding; costs of the third physical to be shared equally. During the process the employee concerned would not be entitled to pay for days that he did not actually work. This section also provided for urine, blood, and/or breath tests for drugs or alcohol at any time determined by the Respondent. Employees who failed would be subject to discharge without recourse to the grievance procedure; but the employee could also be given a chance at a rehabilitation program. In this section Respondent also proposed adding a requirement that the employees pay for examinations that are required of truckdrivers by the Department of Transportation (DOT); Respondent had previously paid for such physicals. *Duration*: Respondent made no specific proposal, but LeMoyne testified that Burchett told the

[5] G.C. Exh. 5, p. 7, recites that Respondent made a proposal which was attached; however, it is not attached. I take this description of the ''Discharge and Suspension'' proposal from Respondent's final proposal; it is undisputed that Respondent never changed the content of the proposal.

Union that Respondent wanted something in the ''five to ten year neighborhood.''

At this session Respondent told the Union that Respondent wanted to convert the basis of pay for unit drivers from hourly to commission-on-sales, but no specific proposal presented.

Comments at the first session about these proposals by Respondent included the following:

In regard to Respondent's sick leave proposal, LeMoyne testified that:

> We had indicated that one of the things we were trying to do was to negotiate a contract throughout the system to try and bring some sense of uniformity to our agreements. One of the areas that we sought to do that in was in the area of sick leave. We proposed no sick days since we don't have them in many of our other agreements. It was an economic item. . . . [The Union] didn't want to see [sick leave] taken away, obviously. They felt that it was a take-away, but, again, another part of our rationale for taking sick leave out was potential abuse, unplanned absence[s] and the disruption that that could cause within the system when somebody does take an unplanned sick day.[6]

Rhodes testified, without contradiction, that one member of Respondent's bargaining team stated flatly that sick leave did not exist at other of Marvin Herb's companies and the Union was not going to get it in Bradford.

LeMoyne testified that Respondent explained its proposals on vacations to be on the basis of ''efficiency.'' In regard to Respondent's proposals to eliminate two of the eight holidays, Good Friday and the first day of deer hunting season, LeMoyne testified:

> We had indicated to the Union and their bargaining committee that the reason that we were making this proposal was to be able to continue to service our customers on those two days. Obviously, if our plant is not in operation, then we don't have product going out to be put on the shelves.

LeMoyne further testified that he then also mentioned to the Union that Respondent's principal competitor, the local Pepsi-Cola franchise distributor, was nonunion and ''could be out servicing the accounts on those days while we would be closed.'' Rhodes credibly testified that Burchett also stated that other of Marvin Herb's companies did not have the first day of deer hunting season as a holiday. LeMoyne testified that Respondent's proposals for enhanced responsibilities for job stewards were an attempt to clarify language of the 1986 contract. LeMoyne testified that Respondent's proposal on the picket line clause was explained to the Union again by reference to the nonunion competitor; it would be possible for the competitor to service accounts that had a picket line while Respondent, if the 1986 provisions remained in effect, could not. Rhodes testified, without contradiction, that management representatives also said, ''We [the Herb companies] don't have it; you don't have it.''

Regarding physical examinations, LeMoyne testified that he told the Union that Respondent's proposals for a new drug testing program would make a safer workplace. Rhodes testified, without contradiction, that Burchett and Green stated that Marvin Herb's companies in Chicago and Indianapolis did not pay for DOT physical examinations, and Respondent was not going to pay for them in Bradford. The proposed requirement that employees pay for DOT physicals was explained by LeMoyne thusly:

> Our proposal was that this is not our law. This is something that is being handed down by the federal government. It should not be our responsibility to pay for that physical for the employee, but rather it was the employees' responsibility to pay.

In regard to Respondent's proposal to make the workweek from Monday through Sunday, LeMoyne testified that ''Ultimately, our proposal would be that employees could work any five in seven days,'' as determined by management. Burchett told the Union that the position was taken because more and more two-income families were doing their shopping on both weekend days, and Respondent wanted to ''get the flexibility to be able to service our accounts on both days of the weekend.'' LeMoyne testified that he told the Union that Respondent was proposing changes in the grievance procedure ''to try to bring some type of uniformity to our collective bargaining agreements. We had this type of language in other contracts, and we were proposing it here.'' The Union responded that there had been no reason to change the language. LeMoyne again stated that Respondent was ''looking for something somewhat uniform for our system.'' LeMoyne testified that Respondent's proposal on discharge and suspension was designed to introduce the concept of ''cause'' being determined by the Respondent. LeMoyne testified that Respondent told the Union that it was proposing to eliminate the 1986 contract language, in the ''General Conditions'' section, that employees were not to lose any benefits because Respondent wanted all past practices (''like wash up time or break time or whatever it might have been'') to be specified in any contract that was agreed to. When asked on direct examination what the Union responded to Respondent's proposal that it be allowed to make all determinations about equipment safety, LeMoyne replied: ''I believe they took exception with the determination of the fitness of the equipment resting with the employer. They wanted to have some input and their members should have some input.'' LeMoyne testified that he told the union negotiators that Respondent was proposing to eliminate union discrimination from the 1986 contract's ''Non-discrimination'' provisions because that was already covered by law.

LeMoyne testified that after the parties went through Respondent's proposals, they went through the Union's noneconomic proposals (some, apparently, for the second time).

The Union proposed a two-tier wage structure which would limit, during the term of the coming contract, the wages of employees hired after May 28, 1989. LeMoyne testified that ''At that point, we indicated to the that while we recognized the language because it came out of an existing Keystone contract . . . that it may not fit with our proposal to go to [commission] route sales.'' LeMoyne testified that he said ''no'' to the Union's proposals for strict seniority

[6] Some of the punctuation of this quotation, and other long quotations, is supplied.

(for layoffs, recalls, and job bidding) and other seniority proposals, but agreed to come back to the seniority issue later. The Union proposed to strengthen the picket line clause of the 1986 contract; the parties again discussed Respondent's proposal to eliminate it. The Union proposed elimination of several provisions of the (broad) management-rights clause; Respondent gave its reasons for wanting to keep all the rights enumerated in the 1986 contract, and the Union ultimately agreed. The Union wanted the ''Loss or Damage to Equipment or Merchandise'' section redrafted to make more clear that a driver was not responsible if he was not at fault. LeMoyne again referred to Respondent's proposal mentioned above. The Union proposed a 5-day period for posting of job vacancies, while the 1986 contract provided 2 days; LeMoyne told the Union that 5 days was too much, and he possibly could agree to 3 days; no agreement was reached.

Second Bargaining Session; August 2, 1989

The parties first reviewed Respondent's positions on all sections that had not been agreed to. The parties compromised on their respective positions on probationary period at 90 days. Other than that, there were no substantive agreements reached. Respondent clarified its workweek proposal to mean any 5 days in 7, but the Union still wanted the Monday through Friday workweek.

Third Bargaining Session; September 5, 1989

In addition to the usual bargaining committees, at the September 5 meeting, Palo appeared for Respondent, and Markowitz appeared for the Union.

After going over what had, and had not, been previously agreed to, Palo presented a 34-page proposal on health and welfare, life insurance, and retirement.

Under the 1986 contract, the employees had a noncontributing life insurance benefit of $7000, with an additional accidental death or dismemberment benefit of another $7000. Under the life insurance program proposed by Palo, Respondent would provide $15,000 life insurance without cost to the employees, but no additional accidental death or dismemberment benefit. In addition, the employees would be allowed to purchase additional term life insurance at low (but ''subject to change'') premiums.

Under the 1986 contract, the employees received a weekly sickness and accident benefit of $100 per week. Respondent proposed to raise that amount to $125 per week ''upon ratification'' and to continue that amount to January 1, 1992. When the amount would be raised to $130; Respondent proposed additional increases of $10, each, at the first of 1994 and 1996, to a maximum of $150 during the proposed seventh year of the contract.

Under the 1986 contract, the employees had a medical plan that required no contribution from them, but which had no major medical provisions. Respondent proposed another plan which required contribution, but it also provided more comprehensive coverage, and it had a major medical provision.

Under the 1986 contract, the employees had an employer-paid retirement plan which provided rather modest benefits; for example, an employee with 15 years' service had vested-only rights to a $78.22 monthly pension. Respondent proposed a 401(k) savings plan, with matching contributions of 50 cents per dollar of employee contribution up to 2 percent of pay. Respondent provided printouts showing what benefits each of the unit employees would receive after 10 and 20 years at levels of contribution from 2 through 8 percent, and what each employee would receive if he retired at age 60 or 65, assuming growth rates of 8 and 10 percent, and allowing for no wage increases over 1988 earnings for those periods. The amounts were substantial for most of the work force, which was almost entirely under 36 years of age.[7] The extreme was a projection for 21-year-old employee John Tingley who, assuming an 8-percent-of-pay contribution until age 65, would amass a return of $1,093,173, further assuming an annual growth rate of 10 percent per year. However, the other extreme was for employee Donald McMillen, who was age 62 (and who had 9 years of service and had then vested only a pension right to $69.85 per month). Under the proposed plan, even if he contributed 8 percent of pay and the contributions earned a return of 10 percent, McMillen would receive a benefit of only $6782 if he retired at age 65. All the amounts that could be accumulated under Respondent's proposed 401(k) plan, including both of those cited in this paragraph, were in addition to the benefits that had vested under the preexisting plan (which was nothing for four of the newer employees).

The union representatives said they would consider the proposals that Palo had presented.

Burchett then presented to the Union a document entitled ''Route Conversion.'' This was a proposal to convert the drivers to a commission-on-sales basis, from an hourly wage basis, which Respondent's representatives had indicated would be forthcoming at the first meeting. As noted, Respondent then employed nonunit employees as salesmen; the unit drivers did not have a selling function, only delivery. Under the proposal of September 5, the employees who had been paid hourly for driving, delivery of merchandise, and pickup of empties, were to be paid $10 per day and a commission for each case that was sold and delivered, and a commission for each case of empties that were returned, and selling was their responsibility. The five individuals who had been presalesmen would become unit commission sales drivers also, and they would be placed at the bottom of the seniority list. There would be 10 such routes, and the drivers could initially select their routes in order of seniority. After the initial selections, however, Respondent could combine, increase, reduce, or eliminate the routes as it viewed business necessities. There was a guarantee that any affected employee would be protected from a loss of earnings, but only for a maximum of 6 weeks.

As presented, none of the commission rates was filled in. The Union asked what Respondent had in mind, and Respondent's representatives took a caucus. After 20 minutes, they came back with figures filled in; for example, a driver would receive 28 cents per case for delivery of 2-liter nonreturnables ''upon implementation,'' and one-half cent more for such function beginning May 28, 1990, and another one-half cent beginning May 28, 1991.

Under Respondent's proposed commission system, the unit drivers, like all other employees, would be required to work any 5 days in 7, as determined by Respondent. There was to be no contractual premium for overtime on either a daily

[7] Of the 16 employees in the unit, 13 were age 36 or younger.

or weekly basis; drivers who were required to work a sixth or seventh day in a week would be paid 1-1/2 of daily base pay, or $5 per day extra, but there would be no enhanced commission rate for a sixth or seventh day worked in a week. There was to be no payment of commissions for ''drop shipments,'' or ''house sales,'' both of which terms applied to sales made by a customer's calling the office and making an order, and the driver only drops off a load, and the customer does the stocking of the goods.

On direct examination, LeMoyne was asked, and he testified:

> Q. Once these proposals were given to the Union, was there discussion concerning the new system?
>
> A. I do recall that there was some discussion that the Union was inquisitive as to how this was going to affect the men compared to what they had before under the pre-sell system as route merchandisers and how it would affect them as route salesmen.
>
> Q. Okay, and did they ask for any particular explanation or information?
>
> A. That particular night they had indicated that it would be advantageous if the company could put forth what we had intended to be the volume of the routes and the commission rates and those sorts of things so that they could properly evaluate one versus the other.
>
> Q. Was that information put out?
>
> A. I recall on very general terms we had discussed talking about routes being set in the neighborhood of 55,000 to 60,000 cases, plus or minus. . . .
>
> Q. At this time had the company actually developed the new route system so you could actually look at it and touch and feel what the new routes would be?
>
> A. No, not at all. We had just started the early stages of development. . . .
>
> Q. To your knowledge, did they have any questions about the system that you hadn't answered?
>
> A. I . . . remember Mike Markowitz asking the question. He was curious as to how many cases the company had sold in the previous year, and [he] indicated that he needed that information to help him evaluate the previous system versus our proposed system.
>
> Q. And did you give him those figures?
>
> A. That night we did not give him the figures. We told him that those figures weren't really pertinent because it didn't make a whole lot of difference *what the men had delivered* under the prior system. They could easily tell, however, what their pay was going to be based on our projected route size and the commissions that we had just finished giving them. They could project dollar earnings. [Emphasis added.]
>
> Q. Was anything further said?
>
> A. I . . . recall Paul Green speaking to the point of conventional route sales and how it was a beneficial system to the employees and to the company as well. [Green] told the Union: ''Quite honestly, the hungrier the route salesman is, and the more cases he sells, the more profit there is for the company.''

At this session, Rhodes, who was inexperienced in negotiating, and who had no experience with commission agreements, largely turned the commission proposal to Markowitz, who is experienced in such matters. Markowitz testified that at the September 5 meeting:

> One of the things that we requested of the company, particularly because the men at the time were working on an hourly rate system, we requested that the company provide us with as detailed information as possible on the drivers' past earnings.
>
> We requested information for the current year, the previous year, in terms of the hours that they worked, the W-2 earnings, cases that they delivered, the routes that they had, mileage was also mentioned, and [number of] stops as well.

This testimony by Markowitz is supported by the testimony of Swackhamer and Rhodes[8] which I found credible, as I found Markowitz credible. I discredit LeMoyne to the extent that he was attempting to deny that the Union was asking for no more than the total number of cases sold by Respondent. I believe that this testimony was carefully structured to fit the fact that, ultimately, the total sales of the plant during 1988 (and 1989) was all that Respondent ever produced for the Union. Markowitz knew what to ask for, and I believe that he did so the first time the commission-on-sales proposal was presented. Moreover, LeMoyne's testimony that the Union asked ''what the men had delivered under the prior system'' indicates that Markowitz at least asked for that much.

Markowitz further testified that the Respondent's representatives replied only by asking why the Union needed such information. Markowitz told them that

> case volume is important because the more cases, the more money you're going to make. As well as the distance traveled. If you're going to travel a long distance for a relatively small number of cases, you're not going to make much money. . . . Again, to be able to evaluate their proposal we have to know what the men had done in the past.

Additionally, Rhodes credibly testified that he told Green and Burchett (who were from Indianapolis and Chicago, respectively):

> Bradford is not exactly Chicago; all that we have up here is trees. I mean, it is not a metropolitan area, you know, big shopping centers or a big shopping area and, you know, I just didn't think that it would work up here.

Bradford, a town of about 63,000 people, is the largest of any serviced by Respondent's operation; the terrain is hilly to mountainous.

Respondent made several other proposals at the September 5 meeting: On the topic of funeral leave pay Respondent repeated its previous proposal, except that pay was $30 per day for the drivers, who were to be commission salesmen, rather than eight times the hourly rate, as had been the case under the 1986 contract. On holidays Respondent continued with its proposal to eliminate Good Friday and the first day of deer-hunting season, but it added two ''floating'' holidays which would be designated by Respondent after consideration of

[8] Tr. 251, L. 22, is corrected to change ''during'' to ''to earn.''

employee requests. Therefore, the employees would retain a total of eight holidays per year. Respondent also proposed converting the drivers' holiday pay from eight times an hourly rate to a flat $30 per day, again to be consistent with its proposal to convert the drivers to commission salesmen. On property and equipment damage Respondent modified its proposal to hold employees responsible only for 1088 caused by ''their negligence and/or carelessness.'' Respondent proposed a new transport operations section whereby drivers who were assigned to its two regular over-the-road functions (trips from Bradford to Buffalo and return, and from Bradford to Buffalo to Meadville, Pennsylvania, and return) would be paid on a flat rate, rather than an hourly basis. The rates for those trips were not filled in. The drivers on over-the-road assignments were to work any 5 days in 7, as determined by Respondent; there were no contractual premiums for Saturdays or Sundays; and there was no specified premium for overtime. Respondent presented a new job bidding proposal under which seniority would be considered, but Respondent would have all rights to make selections, and those selections would not be subject to the grievance procedure.

Fourth Bargaining Session; October 4, 1989

At the beginning of the meeting Respondent's representatives asked if the Union had any questions about its proposals for retirement and health and welfare or its proposal for a commission-on-sales pay basis for the drivers. According to LeMoyne, the Union responded by asking for both the prior case volumes of the Company and the case volumes delivered by each driver. LeMoyne testified, ''we reiterated our position that it really wasn't necessary what the men delivered the year before to evaluate the proposal'' made by Respondent to convert the drivers to commission sales employees. LeMoyne did not testify that he, or anyone else from Respondent's side of the table, told the Union that Respondent did not possess the requested information. Further, according to LeMoyne:

> We said that the routes would be set up geographically, and we anticipated at this stage in our development of the routes that there would probably be 10 routes. (Ultimately, we ended up with 12 . . . .) We would conduct bidding by seniority, and, prior to the time that the route salesmen would have to bid the routes, they would have ample opportunity to review each and every one of the routes, the accounts that were on that route and the sales volume that that particular account did the previous year, and those sales volumes added up were going to come out to about 60,000 cases per route, plus or minus, and that was on actual sales. Not anticipated sales, but a actual case sales for the previous year by account.

On direct examination, LeMoyne was further asked, and he testified:

> Q. Did the Union have any further comments about the system that you were proposing?
>
> A. Well, they were concerned that the men were going to have to work long hours to make these 60,000 cases in sales. There was that concern.
>
> Q. And could you tell the Union anything about the amount of hours that would be worked?
>
> A. No, we couldn't.
>
> . . . .
>
> Q. Okay, what did you tell them?
>
> A. We couldn't project how long it was going to take for a route salesman to go out and cover any of the given routes. We didn't know how long it was going to take to . . . sell and deliver 60,000 cases. There was no way that we could gauge that figure. First of all, we weren't firm enough in knowing where the routes were going to be located, and, obviously, a route salesman who had to drive a significant distance would probably end up working more hours than a route salesman who had a route, say, right in the Bradford city limits. So, he would have to work more hours going further away from the plant than the guy close to the plant. . . . It all depends on how much work the route salesman wants to put into it, or has to put into it.

I asked LeMoyne if there was any way that the Union could have gauged what amount of work the unit employees would have to do under Respondent's proposal. LeMoyne responded: ''I don't think so. We sure couldn't. I don't know how we could tell them, but that is the type of information that they continued to request from us.'' Further on direct examination LeMoyne was asked, and he testified:

> Q. Where did the 60,000 case figure that the company was utilizing, where did that come from, if you know?
>
> A. I recall discussion at different stages in preparing our proposals, but I know that we had input from Paul Green and from Joe Mihock as to how big or how small we ought to have the routes coming in, and I believe it was at their direction that we kind of came up with the 55,000 to 60,000 cases per route.

The Union made proposals on job bidding and drug testing to respond to proposals on those topics by Respondent. No agreements were reached. There was some discussion of eligibility for funeral leave, and a compromise was reached.

Fourth Bargaining Session; October 10, 1989

At the beginning of the session, Respondent's representatives presented the Union with a list of issues which were outstanding then to date, and Respondent's position on each.

On the topic of union security, Respondent agreed to drop its (not previously mentioned) demands to delete provisions relating to the possible future impact of possible future legislation. Respondent also dropped its demand to eliminate that 1986 contract's provision that required posting of job openings for 2 days.

Respondent retained its positions on all other issues in dispute. This included proposals to eliminate the following provisions of the 1986 contract: sick leave, the holidays of Good Friday and the first day of deer hunting season (but substituting two floating holidays), the provision for premium pay in weeks containing a holiday if the employee worked more than 32 hours, double time for work on Sundays, holiday pay for employees with less than 1 year's service, the picket line clauses, protection of employees from claims by Respondent

in the event of damage to vehicles or merchandise when the loss is not caused by employee negligence, the current health and welfare program (but substitution of the one proposed by Respondent on September 5), the current retirement plan (but substitution of the 401(k) plan that Respondent also proposed on September 5), 8 hours of reporting pay for Sundays, the guaranteed 40-hour workweek, and the retention of past practices provision of the ''General Conditions'' section of the 1986 contract. Respondent further persisted in its demands for contractual provisions that anyone who worked less than 40 hours per week be considered a part-time employee and that part-time employees not be covered by the contract, that the period in which (unrepresented, minimum wage) summer employees could be employed would be lengthened by 3 months, and that the period in which an employee working in a lower classification would be paid his regular rate would be limited to less than 1 day.

Respondent's October 10 summary of outstanding issues further recited that Respondent persisted in its demands that employees pay for their DOT physicals, that job stewards bear higher responsibility to prevent strikes and other unproductive activity, and that periods of leaves of absences be attenuated. Respondent further insisted on the institution of a drug-testing program, and it insisted on its grievance-and-arbitration, and its discharge and suspension, proposals that had been presented at the first session. Finally, Respondent's summary of October 10 continued Respondent's insistence on converting the drivers to a commission basis.

The parties discussed various of these issues with no agreements reached, except that the Union agreed to Respondent's proposals on the additional responsibilities of stewards.

Rhodes asked Respondent's representatives if they had any projections of what areas the routes would cover and what the past or projected sales volumes of each route was.[9] Respondent's representatives again said that they did not have that information because, as LeMoyne testified, ''We weren't that far enough along in our preparations to provide that.''

LeMoyne testified that Respondent's representatives asked the Union if it had any wage proposal, and the reply was that the Union did not. Rhodes acknowledged on cross-examination that he made no economic proposals other than the prebargaining session wage proposals that he submitted in March.

The parties addressed Respondent's proposals for the duties of commission drivers. The Union objected to Respondent's proposal that ''route sales employees shall be required to attend sales and/or training meetings as scheduled by the Employer.'' Respondent's representatives replied that, since management had to attend such sessions also, it would schedule no more than necessary and that the training would help the (newly converted) sales employees. The Union further objected to the proposal's requiring (commission) drivers to sort empties, as this had not been required of them before. The Union also objected to a provision that Respondent could split the commission routes up as it saw fit; Respondent's representatives replied that there would be no reason to do so, except for efficiency. No agreements were reached.

[9] LeMoyne testified that Markowitz made this request, but Markowitz did not attend this meeting, and Rhodes was the only union spokesman there.

After this session, by letter dated October 18, LeMoyne sent Rhodes a draft of a complete contract that incorporated all the agreements that had been reached and that reflected Respondent's then- outstanding proposals on all issues that had not been resolved, including a proposal by Respondent for a contract duration of 7 years.

Sixth Bargaining Session; November 1 (and 2), 1989

This session started about 4 p.m. on November 1, and it broke up around 2 a.m. on November 2.

The first order of business was a ''walk-through'' of Respondent's October 18 submission to see what had and had not been resolved by that point.

The parties noted as ''agreed'' sections pertaining to: no-strike and no-lockout; recognition; union shop (except that the parties disagreed on how long the Respondent would have to discharge a noncomplying employee after notice from the Union); probationary period; checkoff; funeral leave rights (but not funeral leave pay); vacations; company uniforms; seniority (except that Respondent proposed to dilute the effect of seniority on job bidding, and Respondent proposed that seniority would be lost for an absence of 6 months if caused by occupational illness or injury—the Union wanted seniority to continue indefinitely in such cases); stewards (including the greater responsibilities proposed by Respondent); posting of union notices; management rights; employer payment for any required employee bonds; prohibition against nonemployee riders on vehicles; reporting pay (except that the Union still wanted to continue 8 hours reporting pay for holidays); language that Respondent would not require employees to drive unsafe vehicles (but not language that Respondent would make all determinations about what was safe); nondiscrimination (including a clause prohibiting antiunion discrimination); prohibition against the use of lie-detector tests; duties (not payment) of route salesmen (except Respondent's proposals that the drivers make the sales, sort empties by size and color, and that they wash and fuel their trucks); and rules for handling second-party checks.

Other matters that I have listed as in dispute as of the beginning of the October 10 session remained in dispute at the start of this session.

The Union raised questions about, and stated its positions on, certain of the unresolved issues. Areas of disagreement that were then addressed and discussed, without agreement, were: Respondent's proposal to reduce pay for employees working temporarily in lower classifications; Respondent's proposal that it could use hourly paid employees (rather than the drivers whom it proposed to make commission employees) to deliver ''drop'' or ''house'' shipments; Respondent's proposal to eliminate the first day of deer-hunting season and Good Friday as fixed holidays (and Respondent's proposal to make both ''floating'' holidays); Respondent's proposal to eliminate sick leave; Respondent's proposal for loss of seniority after an absence of 6 months caused by non-occupational accident or illness; Respondent's proposals to eliminate the picket line clauses of the 1986 contract; Respondent's proposal to reduce holiday reporting pay; Respondent's proposals for reduced leave-of-absence rights; Respondent's proposals for broadened suspension and discharge rights, the Union's proposal that, if transport drivers were to be paid by the trip (rather than hourly as Respondent proposed), they were to receive more pay for work on holidays than Re-

spondent was proposing; Respondent's proposal that the transport drivers' workweek be any 5 days in 7; Respondent's proposal that any employee working less than 40 hours would be considered part time and would not be covered by the contract.

Certain other items were discussed and agreements were reached at this session: Respondent agreed to discharge within 7 days of notice (as opposed to Respondent's originally proposed 30 days after notice) any employee not complying with the union-shop provision (the the 1986 contract had provided that the obligation to discharge was ''upon'' the notice); rate of funeral leave pay for the employees who would remain hourly (i.e., not the drivers); eligibility for holiday pay (including a union agreement to Respondent's proposal that probationary employees were not eligible for holiday pay); holiday pay when the holiday falls on one of an employee's days off; and Respondent agreed with the Union that an employee would not be responsible to it for damages to vehicles (but not merchandise), even if negligence could be shown. Other agreements were cosmetic; there was an agreement to move job bidding procedures from one section to another, and there were insignificant agreements regarding transport drivers. (The Union still did not agree that they would be paid on a trip basis, and the Union did not agree to any other significant change in their status that had been proposed by Respondent.)

The remaining items were passed over, with only a notation of the disagreement.

After this review the Respondent called for a long caucus, after which it came back with a document entitled: ''Final Offer.'' The document was six pages long, mostly handwritten. It contained all agreements previously reached, all of Respondent's proposals on which there had been no agreement, improvements in wages for those employees Respondent proposed to keep as hourly, improvements in commissions for the (then hourly paid) drivers, and improvements in the trip rates for the (also then hourly paid) drivers who drew over-the-road assignments. The proposal further provided for improvements in each of these rates over the 7-year life of Respondent's proposed contract.

Other aspects of the ''Final Offer'' included a $200 ''signing bonus'' for all unit employees and retroactive wage increases back to May 28 for all classifications; but these were ''contingent upon ratification being accomplished by midnight, Saturday, November 4, 1989.'' LeMoyne testified:

> They were shocked that we were giving them a final offer on November 1st. [Rhodes], I recall, made the comment that ''we haven't even given you a counterproposal to your economic offer,'' and we acknowledged that ''that is right—that we [have] been looking for something and asking for something since we first presented it to you on September 5th, and we [have] gotten nothing.

Rhodes did not deny this; however, as well as stating that the Union was more than surprised, he further credibly testified that he told Respondent's representatives:

> You, know, we still want to know the number of cases and stuff like that. So we could figure something out, you know, [to] compare the commission and the hourly rate because we just did not know how it was going to work out . . . . [W]e wanted to know what they were selling now to compare.

Rhodes credibly testified that at one point during the meeting, when he complained that the Union could not tell how long the employees would have to work to deliver 60,000 cases a year, Green responded: ''they could stay out until midnight because they will be making money.''

The Spiral Notebook

General Counsel contends that during the November 1 bargaining session the Union asked Respondent's representatives to produce a certain spiral notebook that was then being maintained by Respondent at the plant. General Counsel further contends that this notebook contained much of the information that had been requested by the Union. Respondent admits that such a request was made at some point during negotiations; it denies that the request was made at the November 1 bargaining session, and it contends that the request was made on January 10; Respondent denies that it possessed the notebook at whatever time the request was made; and it denies that the notebook would have disclosed the volume of individual driver deliveries during the preceding year, the request made by the Union.

Plant Manager Farrell, inside steward (and night loader) Swackhamer, and outside steward (and driver) Randolph testified about the use of the spiral notebook. During 1988, and until at least November 1989, Respondent's presalesmen wrote in a spiral notebook the sales that they made each day. The notebook was then used by the loaders as a guide to loading trucks. The drivers on whose assigned trucks the merchandise was loaded would also use the spiral notebook as a preliminary guide to see if the loading had been done correctly. Final counts were conducted by checking the load sheets which were generated by the office. The notebook did not reflect how many of the loaded cases, if any, went undelivered on any given day; however, that information was later recorded on the load sheets.[10]

It is undisputed that whenever the notebook was requested, Respondent's representatives told the union committee that they did not need the notebook, or the figures contained in it, and they told the union committee that Respondent did not have the notebook, anyway.

When did the Union make the request for the spiral notebook? General Counsel contends that the request was made at the November 1 meeting, at a time when the spiral notebook still existed, and at a time when it was still in use. Respondent contends that the request was made at the penultimate bargaining session on January 10, at a time after the use of the notebook had ceased, and after it had been destroyed.[11]

I have concluded that neither position is correct. I have concluded, and I find, that: (1) the request was made at the final bargaining session on January 22, (2) after its use had been discontinued by Respondent and the employees, but (3)

[10] Testimony of Farrell.

[11] This is an alternative defense; Respondent's primary contention is that the notebook was not relevant to the bargaining process and that Respondent was therefore not under an obligation to produce it, even if it had existed at the time of the request.

when it still existed, and when Respondent still possessed it. My reasons are as follows:

On direct examination Farrell was asked when the request for the notebook was made; he testified, hesitatingly, ''I believe on [January], the tenth.'' He did not sound sure. The issues revolving around the notebook are ones that Respondent seeks to minimize, and I believe Farrell's expressed uncertainty to have been feigned in the hope of getting the trier of fact to agree that the request, and the notebook, were not all that important. LeMoyne, who was present at all sessions, and who was Respondent's keeper of notes, was not asked about the issue when he testified.

Three witnesses for General Counsel testified that the request was made at the November 1 session: Union Representative Rhodes, inside steward Swackhamer, and outside steward Randolph. Rhodes required blatant leading for his assertion on direct examination that the request was made on November 1, and he testified on cross-examination that he could remember no requests for information at that meeting. Swackhamer changed his testimony three times before settling on the November 1 session; and he attributed the request to someone who was not present at that session, Markowitz. Swackhamer was incredible on his fixing of the date of the demand (but not, as discussed infra, on his attributing the request to Markowitz). Randolph claimed on direct examination that he was the one who brought up the notebook at the November 1 meeting;[12] then, on cross-examination, Randolph testified that he did not bring up the notebook at the November 1 session; then Randolph testified (twice) that he told Respondent's representatives why the book was important; then he testified that he said nothing about the notebook's importance at the session. Randolph was incredible (here, and at other points in his testimony).

I find that I cannot rely on any of the above conclusionary testimony about when the notebook was first requested by the Union. To determine when the request was first made, I must rely on other evidence.

Both Swackhamer's and Randolph's testimony about the request and response include the use of phrases that strongly suggest that the request was made in a 1990 bargaining session. Randolph testified that ''[the Union] requested information about the number of cases delivered for each driver for . . . that previous year.'' And Swackhamer testified that Farrell responded that the notebook ''was from last year.'' This phraseology raises at least an inference that the request was made after New Year's Day, 1990.

Both Swackhamer, a night loader, and Randolph, a driver, testified that they had been using the spiral notebook regularly at the time that the request was made. However, Swackhamer testified that when the request was first made, Farrell, inter alia, said, ''I don't even believe that it exists any more.'' And Randolph testified that ''Dave Farrell replied that they did not have the notebook.'' If there had been any truth to the claims of Swackhamer and Randolph that they had regularly been using the notebook at the time that the request was first made, there would have been an immediate chorus of protestations. Specifically, the stewards would have said that they were using the notebook every day if, indeed, they had been doing so. But the stewards said nothing.[13] This circumstance, alone, compels the conclusion that the notebook was not being used at the time it was requested.

Markowitz did not attend the November 1 or January 10 bargaining sessions; Swackhamer did not attend the January 10 session. However, both Markowitz and Swackhamer were were present at the final session, January 22. Unquestionably, Swackhamer was there when the request was made; and Swackhamer had no reason to say that Markowitz made the request if it were not true (and a true ''slip of the tongue.'')

Therefore, the request was made when both Markowitz and Swackhamer were present. They were both present only at the meetings of September 5, October 4, and January 22. Markowitz testified about the meetings of September 5 and October 4, but he did not mention any request for the the notebook (and General Counsel does not contend that the request was made that early). This leaves the meeting of January 22.[14]

Randolph, a driver, worked days; Swackhamer, a loader, worked nights. Both Swackhamer and Randolph testified that, on November 2, on their first shifts after the session during which the notebook was requested, they each found the notebook at the plant, in the drivers' room. Swackhamer also testified that when he found the notebook on his shift, he called Rhodes and reported his discovery. Swackhamer testified that Rhodes only told him not to take the notebook because it was company property.

Rhodes did nothing about Swackhamer's report. Specifically, there is no testimony that, at any subsequent bargaining session, Rhodes mentioned the discovery of the notebook to any of Respondent's representatives.

The notebook contained precisely the type of information that the Union had been requesting since September 5. If there had been any truth to the testimony of Swackhamer and Randolph, that on, November 2, they found the notebook in its usual place, and if there had been any truth to Swackhamer's testimony that he notified Rhodes of the discovery on November 2, something would have been done about it by Rhodes. Rhodes would assuredly have mentioned the discovery, most probably with table-pounding forcefulness, at the next bargaining session (if not before). But Rhodes did not do that; he did not mention the discovery of the spiral notebook at the next session because there was no ''next'' session. That is, Rhodes got Swackhamer's report of the discovery of the notebook after the final meeting on January 22, as I here find.

I do not believe that Swackhamer and Randolph concocted the stories about finding the notebook, although I believe they fabricated their accounts of when they found it. I also do not believe that Farrell attempted the bald-face lie that

[12] So did Swackhamer.

[13] On direct examination, Randolph offered no testimony that he said something when Farrell said that the notebook was no longer used. On cross-examination, after he had apparently realized the implausibility of silence after Farrell's statement, Randolph first said that he did tell the bargaining committees that he was currently using the spiral notebook. Then Randolph acknowledged that he had said nothing; he could not explain why.

[14] Markowitz also did not mention the request for the notebook in his testimony about the January 22 meeting; however, for Markowitz to have done so, he necessarily would have had to contradict General Counsel's other three witnesses who had previously testified that the request for the notebook was made on November 1.

Respondent did not have the book if, at the time, it was sitting at its usual place back at the plant, as Randolph and Swackhamer implied. These factors are not irreconcilable; indeed, they prove that the notebook existed through the termination of negotiations.

I believe, and find, that the spiral notebook was found by Swackhamer and Randolph after the final session, although, because it was no longer in use, they most probably did not find it lying out in its usual place. They, or one of them, found it in the closet or some other place to which it had been discarded. At one point in his testimony, Farrell testified that the notebook, along with other materials, had been placed in some closet when a new computer system was installed in late December or early January. It was possibly such a closet that Swackhamer or Randolph found the notebook. Farrell also testified that the closet was later cleaned out and that the contents were destroyed. This was probably true, but the closet-cleaning necessarily happened at some time after Swackhamer and Randolph found the notebook.

In summary: the spiral notebook in question was not requested until January 22, several weeks after its use had been discontinued, although it existed, and was in Respondent's possession, until that point.

The November 2 Company Meeting

At the termination of the November 1 bargaining session, in the early hours of November 2, LeMoyne told Rhodes that he would be explaining Respondent's final offer to the employees at the beginning of the November 2 day shift.

LeMoyne and Green went to the plant the next morning where they addressed the employees whom they had convened in the drivers' room. Green and LeMoyne described Respondent's final offer, including Respondent's proposal that there would be a $200 signing bonus and retroactivity to May, if there was a ratification by November 4. Randolph and Swackhamer[15] testified that Palo attended this meeting and that he told the employees at one point that the employees should ratify the final offer because things could only get worse. The complaint alleges that this remark was a violation of Section 8(a)(1).

Palo, Farrell, and LeMoyne testified that Palo was not in attendance at this meeting, and I credit their testimony. In brief, General Counsel argues that if Palo did not make such a statement on November 2, he must have done so at some other time. Palo was not asked about his statements on other occasions, and the issue was not litigated.[16]

I shall recommend dismissal of this allegation of the complaint.

First Ratification Meeting

On November 4, Rhodes conducted a meeting of the unit employees. He explained the situation to them, but no ratification vote was taken.

(Randolph, who had been present at the ratification meeting, told Plant Manager Farrell of the results that same afternoon when he happened to meet Farrell on a street in Bradford. Randolph was asked on redirect how he happened to give the results to Farrell, and Randolph replied: ''He wanted to know, and I figured that since I was the Union steward that I would be the one to tell him.'' General Counsel argues that Randolph had no authority to tell Respondent of the results of the ratification meetings, of which there were three. In view of the ultimate result, this does not matter. I would, however, point out that Randolph was a union negotiating committee member, and there is no reason why he should not have made such reports. Moreover, at least once, Rhodes was told that Respondent was getting such reports, but Rhodes did not tell Respondent that only he could announce the results of ratification meetings.)

Promises to Randolph

Randolph testified that in late December he spoke to Farrell in the drivers room at the plant when no one else was present. He asked Farrell if, as he had heard, the ''benefit package'' of the nonunit salesmen was better than the ''benefit package'' that the unit employees had, and Farrell replied that it was. Further according to Randolph:

> I asked him what we could do to get the better benefit package. . . . Mr. Farrell said that if we were to decertify the Union that it would be—that we could possibly get the better benefit package. . . . He, Mr. Farrell said that he had an address from the Labor Relations board and a phone number, and he gave it to me.

Randolph testified that Farrell did not say why he was giving Randolph the number.

Randolph further testified that a few days later he telephoned LeMoyne. According to Randolph:

> I called [LeMoyne] and asked him if there were different benefit packages and he said that there was and that the non- bargaining unit package was better. . . . I asked Mr. LeMoyne if the bargaining unit were to decertify the Union, if we were—would we get the better benefit package. Mr. LeMoyne stated that he could not guarantee it but that the company would look into it; it would be a possibility.

On the basis of this testimony, which was denied by LeMoyne and Farrell, the complaint alleges that Respondent promised employees better terms of employment if they rejected the Union.

Randolph initiated these conversations with LeMoyne and Farrell, but he was not asked why he did so, and he did not volunteer. I believe Randolph was trying to trap LeMoyne and Farrell, and I credit the testimony of the two supervisors that they did not fall for it. I shall recommend dismissals of these allegations that are based on Randolph's testimony.

Seventh Bargaining Session, January 10, 1990

The usual committees were present for this session, except that John Namey and Vince Murphy of the Teamsters International Union were present, and Swackhamer, as previously noted, was absent.

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[15] Swackhamer testified that he was not in the drivers' room as Palo spoke, but he was in an anteroom where he could hear what Palo was stating to the employees who were in the drivers' room.

[16] The complaint originally alleged just such a violation by Palo on January 23, 1990; however, at the start of the hearing General Counsel moved to change the allegation to November 2, 1989. In so doing General Counsel prevented litigation of the possibility that Palo made such a subsequent violative statement.

At the start of the session, the Union indicated that the unit members had several questions about how the commission-on-sales proposal would work. According to LeMoyne:

> John Namey had raised a concern that the men were going to have to work a lot harder under the company's proposal to make this money that we said they were going to make. He indicated that the routes would be built . . . and developed by the men over a period of time and the company would come in and cut them. And at that point we reiterated that . . . the company doesn't save any money when it goes in and cuts routes and makes route adjustments. [And] that over a short period of time the routes start to rebuild. The men have even more time to go out and do the selling and the execution and rebuild the routes to their former levels.

On the information issue, LeMoyne testified:

> We got into a discussion about the sales volume. [Rhodes] had indi cated that the Union was still looking for sales figures for 1988 and 1989 with regards to cases, and . . . Paul Green indicated that it really wasn't important because we were going to construct the routes at about 60,000 case sales, and that was based on the volume that was done in the previous year by account.

Plant Manager Farrell testified that during this meeting the Union asked ''how many cases normally is a route merchandiser delivering during the day.'' Farrell testified that he replied that ''We don't track it,'' and he referred the question to two unnamed employees who had come to the session. They replied, according to Farrell, ''anywheres from 250 to 275 cases'' on a daily average.

LeMoyne testified that the Union again questioned how long the employees would have to work to deliver 60,000 cases per year, and:

> With regards to geographics [sic], there was a concern by the Union that some of the men were going to have to drive long distances and not be compensated for it. Well, the bidding would take care of that. The senior people would get the routes that they felt were the most desirable and the junior people would get the routes that were left over. With respect to the number of hours that the people would have to drive, yes, it was conceivable [that] there could be some long days depending on which route you bid. On the other hand, there might be some short days, depending on which route you bid. Conceivably, a route here in the Bradford area may only take six, seven, or eight hours a day. The driver who has to go to Jamestown [New York] might be working 10 or 11 hours a day. He is going to spend a lot of time traveling to his route. So that concept, that situation, was relayed to the Union.

At some point in the meeting Respondent gave the Union 10 index cards, each of which listed a possible route. Each route had the names and locations of the customers and the prior year's sales to each such customer. Each card showed a projected volume of 60,000 cases per year, or more. The listing was in the drafting stage; Farrell stated that accounts that had sold 15,000 in the previous year had not been assigned to routes; also Farrell told the Union that additional routes may be required in the future to service all of the accounts.

Also during this session, the Union was given a printout of the total case sales by the Company, including ''house'' sales, in 1989 and 1990.

Green, according to LeMoyne,

> had worked up a quick calculation taking a current driver making $8.05 an hour times 2,080 hours coming up with $16,744, and compared that to the proposal that we were making of approximately 60,000 cases . . . coming up with the base plus commission figure of $21,500. That information was shared with the Union as well.

The Union attempted to steer the discussions back to ''language'' issues. Namey said that the Company's proposals on physical examinations was ambiguous. Respondent stated that it had the same rights under the expired contract. There were other short exchanges on other ''language'' issues.

According to LeMoyne:

> [F]inally about quarter after nine, the company presented a modified final offer, and that offer was that . . . until Sunday, January 14th, at 10:00 a.m., we would continue, or maintain, the final offer that was presented on November 1, 1989, except that the [$200] ratification bonus which was offered at that time as an incentive to ratify was being taken off the table, but that retroactivity back to May 28th would stay on the table as an incentive to ratify.

The Union asked that Respondent ''hold off'' in order that it could submit counterproposals. Respondent's representatives refused. According to LeMoyne, Green concluded: ''Check us out; it won't get better.''

Second Ratification Meeting

On January 14, the employees voted unanimously to reject Respondent's modified final offer. Respondent was informed of the results by Randolph who called Farrell to announce the results.

Eighth Bargaining Session January 20, 1989

Present for the Union was Swackhamer and the rest of the Union's usual committee, and Markowitz. Present for the Respondent was its usual committee, and Palo.

At this meeting the Union asked questions about several of Respondent's proposals, including the proposed commission system. The questions were answered, but at some point Palo terminated such discussions by stating that the Union had had most of the proposals since September 5, and all of them since November 1, that Respondent had a business to run, that the parties were at impasse. Further according to LeMoyne, Palo told the Union:

> We are going to put in our new compensation and route sales system. We are making a final offer, and that is [that] the offer made on November 1, 1989, remains on the table. However, there would be no ratification bonus. There would be no retroactivity of wages.

> The proposal was good through midnight on Saturday, the 27th of January, and after that, if the ratification occurs, the effective date would be the date of ratification, and the contract dates as previously proposed of May 28th . . . in subsequent years would be maintained. The expiration would then be . . . May, 27th or May 28, 1996. If the proposal wasn't ratified by midnight on the 27th, effective Monday morning, the company was going to go ahead and implement its proposal and the routes would go up for bid, and the route conversion would begin to take place. . . . The next increase would be one year from the date of implementation.

That is, either way, Respondent's proposals would be implemented the following Monday, but, if the employees ratified the agreement, their next raises would be effective on May 28, 1990; otherwise, they would be effective January 29, 1991.

LeMoyne also testified that, at some point in the meeting, Markowitz asked for the number of cases delivered by each driver and the time required to deliver those cases, and that Markowitz further stated ''that there was no way to effectively evaluate our proposal without that information.'' LeMoyne testified that he did not recall the Union having asked for the hours required before.[17] LeMoyne did not testify what, if anything, Respondent's representatives responded.

On direct examination LeMoyne was asked, and he testified:

> Q. In terms of the number of cases being delivered previously by a route driver, the hourly paid route driver, did the company have any easy source of information to provide that type of information?
>
> A. Not that I was aware of, and I became aware of this, I guess early in the negotiations when the request was first made, but we don't maintain any records on our computer system which show the number of cases being delivered by the route merchandisers or route drivers. Our system keeps track of cases sold by the account managers, and there was no easy way for us to determine who delivered which cases that were sold.

LeMoyne was not asked what use the load sheets, as described by Randolph and Farrell, could have been in assembling such information.

Third Ratification Meeting and Alleged Unilateral Action

On January 27, Rhodes conducted a meeting of the unit employees at a local union hall. He recommended that the employees not vote on Respondent's last offer. As Rhodes testified, ''I told them, 'you guys are crazy. You can't vote on this.''' The gathered employees insisted, and Rhodes conducted a secret ballot election. The employees voted in favor of ratification of Respondent's final offer by a count of 8 to 5. Rhodes announced the tally by stating, ''You people it was an eight to five vote, but . . . as far as I am concerned, you don't have a contract.'' Again, Randolph notified Farrell of the results of the voting.

On January 29, Respondent implemented its final offer, as modified on January 22. The complaint alleges that this action was unilateral, and that it violated Section 8(a)(5).

Other Alleged Violations of Section 8(a)(1) of the Act

On direct examination, Randolph testified that, in March 1990,[18] he and employee Joe Lundgren, who did not testify, collected a sheet of signatures from the employees. The sheet stated that the employees did not wish to be represented by the Union. He and Lundgren took the sheet to Farrell. Randolph stated, twice, that nothing was said when he and Lundgren gave Farrell the list. Randolph further testified that on April 10, he and employee Lundgren went to Farrell's office and presented Farrell with a second list of employees. (The second list, Randolph testified on cross-examination, was broken down by employees who were, or were not, unit employees before Respondent reorganized the unit and placed all presalesmen into the unit; this was done, according to Randolph, at the suggestion of a NLRB Regional Office employee.) Further according to Randolph on direct examination, when he and Lundgren presented the second list, Farrell reached into his desk and pulled out ''the'' Board decertification petition form (not previously mentioned in Randolph's testimony) and handed it to Randolph, and Randolph signed it. Randolph testified that Farrell took the petition and stated that he would take care of it; and Randolph never saw the petition again.

On the basis of this testimony, alone, the complaint alleges that Respondent assisted its employees in the filing of a decertification petition, in violation of Section 8(a)(1).

A decertification petition bearing Randolph's signature, which was dated April 10, was filed on April 16. Randolph testified that, at some unspecified point, he withdrew the petition at the request of either a Board employee or someone from the Union: he did not know which.

Randolph's testimony on direct made it look like Farrell was just waiting with a petition to be signed after supporting signatures had been collected. Randolph gave an affidavit to the Board on April 4, or just a week or so after being on Farrell's office. In that affidavit, Randolph testified that he and Lundgren gave Farrell the Board petition in the March meeting. On cross-examination, Randolph testified that he had given the petition form to Lundgren when he received it from the Regional Office, and he had not seen the form again until the time Farrell pulled it out of his desk drawer.

I do not believe that, when Randolph (and/or Lundgren) gave Farrell the first set of signatures (and, possibly, the petition), that absolutely nothing was said, as Randolph insisted. I further do not believe that Randolph could not remember who had suggested to him that he should withdraw the petition. It was very clear to me that Randolph was hiding something; I need not speculate what.

I further find it impossible to reconcile the inconsistency between Randolph's affidavit which states that he and Lundgren gave the petition form to Farrell, and his trial testimony which was that he gave the petition to Lundgren at some point and did not see it again until Randolph pulled it out of his desk drawer. Randolph was given every oppor-

[17] The complaint does not refer to a request for information about prior hours worked by the drivers.

[18] All dates in this subsection are in 1990.

tunity to explain the inconsistency, but he could not do so. At one point he attempted the nonsensical scenario that, on April 10, Farrell took the petition out, then put it back, then took it out again and gave it to Randolph. Randolph did not suggest any reason why Farrell would have done this. Randolph also did not suggest any reason why Farrell would have handed the petition to him, rather than Lundgren. Nor is there any suggestion of why Randolph, without being asked, and without question, would have signed the decertification petition. Again, I firmly believe that Randolph was hiding something; in the process, he rendered himself an incredible witness on this line of testimony.

Farrell denied having anything to do with a decertification petition. Although Farrell was not overly impressive, Randolph was less so. This was possibly because of Randolph's fatigue, as General Counsel suggests on brief, but, in any event, Randolph was incredible.

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

I shall further recommend dismissal of complaint's allegations that Respondent, by Farrell, violated Section 8(a)(1) by (a) threatening its employees, on January 2, 1990, with unspecified reprisals if they failed to ratify the collective-bargaining agreement proposed by Respondent, and by (b) encouraging its employees, on February 28, to seek decertification of the Union. Both of these allegations depend entirely on the testimony of Swackhamer who testified that he overheard such remarks by Farrell as Farrell addressed other employees. None of the other employees testified to the alleged statements; the account of overhearing remarks addressed to others is essentially the same as Swackhamer's clearly erroneous account of how he overheard Palo's alleged threat to other employees on November 2, and Farrell credibly denied the remarks attributed to him by Swackhamer.

Farrell did not deny, however, testimony by Randolph that shortly after Randolph gave an affidavit on April 6, Farrell asked him what he had told the NLRB. Although there are distinct problems with Randolph's testimony elsewhere, I must credit this testimony because it is undenied.

B. *Analysis and Conclusions*

1. The refusal to furnish information

The Act requires employers to produce during collective-bargaining negotiations requested information that it possesses, if the information is relevant and necessary for the requesting union to engage intelligently in the collective-bargaining processes.[19] LeMoyne admitted that the Union requested the number of cases delivered by each unit driver during the prior year at the fourth session, on October 4. I have found that the request was first made at the third session, on September 5, but, in either event, the information was clearly requested, as Respondent concedes. Respondent first argues that it did not possess the requested information at the time it was requested. Secondarily, Respondent argues that the information was not relevant.

The requested information was possessed by Respondent at the time the request was made.

First, it requires something less than speculation to conclude that Coca-Cola maintains records that will allow it to trace deliveries if, during ordinary business operations, questions arise. Moreover, the drivers were required to make collections; at some point, a reconstruction of who-made-collections-for-what assuredly could have been made.

At the hearing, LeMoyne was asked on direct examination ''did the company have any *easy* source of information to provide that type of information.'' LeMoyne gave an answer that concluded: ''there was no *easy* way for us to determine who delivered which cases that were sold.'' Under the statute, the Union was not required to confine its informational requests to those that are ''easy'' to comply with. Moreover, since at bargaining Respondent's representatives asserted only that the information was not relevant, and that it did not have it at all, the degree of ''ease'' with which Respondent could fulfill its statutory obligation is not an issue in this case.

It is undisputed that the spiral notebook contained the numbers of cases that were loaded on each driver's truck during 1989, at least to November. As I have found, that book existed, and was possessed by Respondent at the Bradford plant, throughout the negotiations. Assuming relevancy, Respondent had a duty to produce the requested notebook, even if it had to conduct a search (as did Randolph and Swackhamer).

I have found that the notebook existed at the time it was requested; however, even without such factual resolution, it must be noted that the law does not require a union to designate precisely where the requested information is located. On September 5 the Union requested that it be supplied with the number of cases that each driver had delivered. It did not then ask for the spiral notebook, but it was not required to. It is not disputed that the notebook was in Respondent's possession on September 5 and, presumably, Respondent then knew what was in it. If the information in the notebook was relevant, it should halve been presented then, even if it had not been requested in specie.[20]

Assuming, contrary to my findings here, that the notebook had been destroyed by the time the Union requested the information about the number of cases delivered by each unit driver, Respondent is still not excused. As noted, Respondent's questioning of LeMoyne, alone, leaves the inference that the information could have been obtained, albeit with an effort that would be classified as something more than ''easy.'' More importantly, the undisputed testimony of Randolph was that the spiral notebook was merely a preliminary guide as to what was loaded on his truck each day. After the loading was completed, he went to check the load sheets before departing on his daily rounds. In fact, Farrell corroborated Randolph's testimony as he testified that the spiral notebook was:

> [b]asically just for dispatching the trucks at night, making sure that the right gentleman got to the right truck [the following morning.] It was just a back-up system for us.

[19] There is a corresponding statutory obligation on the part of unions.

[20] I believe that Swackhamer and Randolph were under the impression that the Union was required to request the notebook, itself, while bargaining was ongoing, and they tailored their testimony accordingly.

The load sheets were the official record. As Farrell testified, they even contained a recording of how many cases each day were returned, if any. Neither LeMoyne, nor Farrell, nor any other witness presented by Respondent, testified that the load sheets were no longer in existence. Most certainly, the load sheets for a quarter of a year—from the original request for the information on September 5 until negotiations ceased—were available for production.

Accordingly, I find and conclude that, at all relevant times, Respondent possessed the information requested by the Union.

The requested information was relevant.

The standard for determining the necessity for information is only a showing of ''probability that the desired information was relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co.*, 385 U.S. 432 at 437 (1967).

Respondent's economic proposals were premised on its assumption that the Union would agree that the drivers would work whatever hours that were necessary to deliver 60,000 cases per year. This may have been an outrageous assumption, but it may also have been perfectly reasonable. The obvious question would arise: how many cases did the employees deliver during the last year. If it was about 80,000 cases, the Union might have thought that the assumption was not only reasonable, but inviting. The employees could make a projected wage with possibly less effort.[21] If it was 40,000 cases the Union would be inclined to propose compensating overtime rates, or better commissions, if it had been inclined to bargain about a conversion to a commission system in the first place. In either event, however, the Union would need the information to put Respondent's proposals in perspective.

On the issue of relevancy, Respondent also argues that because there were sometimes returns, the number of cases loaded, as listed in the spiral notebook or elsewhere, could never have been a meaningful piece of information. The concession by Farrell that the load sheets listed whatever returns there were refutes Respondent's position in this regard. Additionally, I would point out that Respondent was in the business of delivering product; any returns would necessarily have been minimal. At any rate, disclosure of the the number of cases that had been loaded on each driver's truck would have been more useful, and more relevant, to the bargaining process than no information at all.

Accordingly, I find and conclude that the requested information, the number of cases that each driver had delivered during the year preceding the request of September 5, was relevant to the bargaining processes.[22]

Finally, Respondent argues that the Union already had the information that it requested; therefore it was not necessary for Respondent to produce anything pursuant to the Union's requests. For this assertion, Respondent relies solely on the fact that, at the January 10 session, two unidentified employees stated that, at the time, they had been delivering 250 to 275 cases per day. The Union is not required to accept such undocumented, subjective estimates from two employees as a substitute for hard information that is possessed by Respondent while it considers proposals that would affect all 10 drivers then in the unit.

I therefore find and conclude that Respondent possessed, and failed and refused to produce, requested information that was relevant and necessary to the bargaining processes. In so doing, Respondent violated Section 8(a)(5) and (1) of the Act.

2. Overall bad faith

Respondent was free to propose a commission basis of pay for the drivers, just as the Union was free to propose continuation of an hourly basis. Respondent was free to insist to impasse on the conversion to commission, just as the Union was free to insist to impasse on keeping the hourly system for drivers. If that was all there were, there would not have been a violation, and Respondent would have been free to implement its last proposal after impasse.

However, Respondent's tactic of demanding a conversion to a commissionon-sales basis as a method of payment for the drivers, while withholding information which would allow the Union to place that demand in perspective, necessarily permeated, and stultified, the entire bargaining process. There was not much use in attempting to talk about other issues as long as Respondent was using this tactic to subvert meaningful bargaining about the primary aspects of the employment relationship, wages and hours.

Had the Union been furnished the information for which it asked, it could have determined whether the objective of 60,000 cases per year was acceptable to it or not. If the Union had found that the 60,000-case-per-year objective was reasonable in light of the knowledge of what the drivers had been delivering before, bargaining could have moved on to other issues, such as how the routes would be initially designed or how alterations of the routes would be accomplished. If the Union had found the objective unreasonable, in light of the knowledge of what the drivers had been delivering before, the Union could have demanded a lower standard, or offered an hourly wage proposal that might have been more palatable to Respondent. However, Respondent's tactic of demanding a conversion to a commission system for the drivers, coupled with its withholding of information that would have made the proposal intelligible, made it impossible for the Union to respond on any basis to Respondent's proposals.

The situation was exacerbated by Respondent's insistence that the drivers would work any day of the week that it designated, for any number hours per day that it might take to deliver the unilaterally determined quota of cases. In addition to that, the drivers were to attend any number of sales meetings that were unilaterally designated by Respondent, and they were to stay at those meetings for any length of time that Respondent unilaterally designated. That is, concurrently with its demands that drivers meet quotas that the Union could not comprehend without the information that Respondent was unlawfully withholding, Respondent also demanded an open-ended commitment from the Union that the drivers would work ''until midnight'' (Green's words), if necessary

[21] Markowitz testified that this sometimes happens under commission agreements. (However, this was unlikely in the rural, mountainous area covered by Respondent's operations; also, LeMoyne referred only to the Bradford route as one that could be done in 8 hours or less.)

[22] At one point, Respondent produced documentation of the total sales of the plant. This was not relevant; it could not have been divided by 10 to determine (even) an approximation of how hard each driver worked since it included ''drop sales'' or ''house sales'' for which Respondent was proposing to pay no commissions.

to meet the (unilaterally established) quota of 60,000 cases per year, at no contractual premium for overtime, except $5 per day for working a sixth or seventh day in a week.

As well as an open-ended commitment on hours, Respondent's initial, and final, proposals demanded an open-ended commitment to work routes as specified by Respondent. Even at the last bargaining session, Respondent had not completed how the routes would be designed. Moreover, even if the Union had been given such information, under Respondents proposals, Respondent would have been free to alter the routes the next day.

The Union could not have agreed to accept the proposal for a conversion to the commission system when the proposal was presented in this posture. It could not have known what it would have been agreeing to—except that it would have been agreeing that the drivers would be working when Respondent wanted, they would be working for as long as Respondent wanted, and they would be working as hard as they had to in order to deliver 60,000 cases per year, as Respondent wanted them to do. And, if it agreed to Respondent's proposal for duration of the contract, the Union it would have undertaken this open-ended commitment on behalf of the employees for 7 years.

The information that would have made Respondent's proposals somewhat more intelligible was withheld when it would have been ''easy'' to produce it; the load sheets or the notebook could have been presented at any time, had Respondent had any intention to arrive at an agreement with the Union. The only possible reason for withholding the information was that Respondent did not want an agreement with the Union. That is, Respondent bargained with an intent to frustrate agreement, rather than reach agreement. It employed the technique of insisting on radical changes in wages and hours, while concurrently withholding information that would make the new terms comprehensible.

Respondent's bargaining on other issues does not, of itself, reflect a desire to frustrate agreement. Contrary to the implicit arguments of General Counsel, Respondent was not required to propose, or agree to, terms simply because they were contained in prior contracts. Moreover, while General Counsel may consider the reasons advanced by Respondent for its other proposals were ''not sufficient reasons,''[23] apparently on some theory of acceptability, General Counsel does not contend that Respondent refused to give its reasons for its proposals when asked by the Union; nor does General Counsel assert that the reasons were false, misleading, or not honestly held.

However, the above analysis of Respondent's technique of bargaining on wages and hours, the core terms of the employment relationship, demonstrates that Respondent took an overall approach designed to defeat the attempt by the Union to achieve a collective-bargaining agreement. That is, Respondent was willing to go through the motions of bargaining on other issues, as long as it could subvert the bargaining process on those most important issues of all, wages and hours.

This conduct violated Section 8(a)(5) of the Act, as I find and conclude.

[23] Br. p. 32.

3. The unilateral actions

Since agreement with the Union was prevented by Respondent's bad-faith bargaining tactics, Respondent cannot claim that its unilaterals actions of January 29, 1990, were taken only after (good-faith) impasse.[24]

Finally, Respondent contends that it implemented its final offer only after it received notice that the unit employees had ratified its final offer as the terms of an acceptable contract. On January 22, Respondent announced that it was going to implement its final offer on January 29. If the employees ratified Respondent's last offer by midnight, January 27, they would be given pay raises effective on May 28, 1990. If they did not ratify Respondent's final offer by midnight, January 27, they would not receive wage increases for a year following implementation of that offer, or January 29, 1991. But, in either event, Respondent was going to implement its final offer on January 29, 1990. Of course, even though their collective-bargaining representative recommended against it, the employees voted to get a raise on May 28, 1990, rather than wait until January 29, 1991.

Respondent's attempt to take advantage of this coercively induced ''ratification'' of the product of its unlawful bargaining tactics is a cynical effort by Respondent to profit by its own wrongdoing. This, the law will not permit.

CONCLUSIONS OF LAW

1. Bradford Coca-Cola Bottling Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Bradford Coca-Cola Bottling Company constitute an appropriate unit for collective bargaining:

> All truck drivers, warehousemen, cooler servicemen, and bottle sorters, and the ''night working foreman,'' at Respondent's Bradford, Pennsylvania operation; excluding any professional employees and guards, and supervisors as defined by the Act.

4. At all times material here, and continuing to date, the Union has been, and is, the exclusive representative of all employees within the above unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by the following acts and conduct:

(a) Failing and refusing to furnish to the Union information relevant and necessary to the bargaining processes.

(b) Refusing to bargain collectively in good faith concerning wages and hours of employment with the Union.

(c) Changing unilaterally the terms and conditions of employment of bargaining unit employees.

6. By interrogating an employee about his cooperation with NLRB processes, Respondent has violated Section 8(a)(1) of the Act.

7. Respondent has not otherwise violated the Act as alleged in the complaint.

[24] *American Meat Packing Corp.*, 301 NLRB 835 (1991).

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Bradford Coca-Cola Bottling Company, Bradford, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union as the exclusive representative of the employees in the unit described above by refusing to furnish to the Union information that is relevant and necessary to the bargaining processes, by negotiating in bad faith with the Union, or by making unilateral changes in the terms and conditions of employment of bargaining unit employees.

(b) Interrogating employees about their cooperation in NLRB processes.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with Chauffeurs, Warehousemen and Helpers Local Union No. 110, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive bargaining representative of the employees in the unit described above and, if an understanding is reached, embody such understanding in a written, signed contract.

(b) On request, rescind the unilateral changes made in employees' wages, hours, and other terms and conditions of employment on January 29, 1990, and make the employees whole, with interest, for any losses suffered as a result of the changes.

(c) On request, furnish to Chauffeurs, Warehousemen and Helpers Local Union No. 110, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, any and all information that is relevant and necessary for the purposes of collective bargaining.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay or other payments due under the terms of this Order.

(e) Post at its Bradford, Pennsylvania facilities copies of the attached notice marked ''Appendix.''[26] Copies of the notice, on forms provided by the Regional Director for Region 6 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees about their cooperation in NLRB processes.

WE WILL NOT refuse to bargain collectively in good faith concerning wages, hours, and other conditions of employment with Chauffeurs, Warehousemen and Helpers Local Union No. 110, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All truck drivers, warehousemen, cooler servicemen, and bottle sorters, and the ''night working foreman,'' at our Bradford, Pennsylvania operation; excluding any professional employees and guards, and supervisors as defined by the Act.

WE WILL NOT unilaterally change the terms and conditions of employment of bargaining unit employees.

WE WILL NOT refuse to furnish to Chauffeurs, Warehousemen and Helpers Local Union No. 110, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, requested information that is relevant and necessary to the collective-bargaining processes.

WE WILL, on request, bargain in good faith with Chauffeurs, Warehousemen and Helpers Local Union No. 110, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive collective-bargaining representative of our employees in the above appropriate bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on request, rescind the unilateral changes we made in employees' terms and conditions of employment on January 29, 1990, and make our employees whole, with interest, for any losses suffered as a result of the changes.

WE WILL, on request, furnish to Chauffeurs, Warehousemen and Helpers Local Union No. 110, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

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[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Helpers of America, AFL–CIO, information that is relevant and necessary to the collective-bargaining processes.

BRADFORD COCA-COLA BOTTLING COMPANY